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No. 06-5306

In the Supreme Court of the United States

KEITH BOWLES, PETITIONER

v.

HARRY RUSSELL, WARDEN

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENT

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QUESTION PRESENTED

Whether a court of appeals may excuse the untimely filing of a notice of appeal in a civil case, where the district court has reopened the filing period for 17 days under Federal Rule of Appellate Procedure 4(a)(6), rather than the 14 days permitted by the rule, and the appellant filed his notice within the time set by the district court but not within the time allowed by the rule.

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INTEREST OF THE UNITED STATES

This case presents the question whether a court of appeals may excuse an appellant's untimely filing of a notice of appeal, where the district court has purported to extend the time for filing for longer than permitted by Federal Rule of Appellate Procedure 4(a)(6). The United States and its agencies are the Nation's most frequent litigants. Because this Court's resolution of the question presented can be expected to affect the conduct of litigation in which the government is involved, the United States has a significant interest in the disposition of this case. More generally, as a frequent litigant, the United States has a vital interest in the consistent and predictable application of established rules of procedure. The United States has previously

participated as *amicus curiae* in cases raising similar issues. See, *e.g.*, *Kontrick* v. *Ryan*, 540 U.S. 443 (2004).

STATEMENT

1. Petitioner was convicted of murder in an Ohio court and sentenced to imprisonment for 15 years to life. J.A. 14. After his conviction was affirmed on direct review, petitioner, who was represented by counsel, sought habeas relief in federal district court. J.A. 14-22. The district court referred the case to a magistrate judge, who recommended that the petition be denied. J.A. 89-104. The district court adopted the magistrate's findings and denied the petition. J.A. 140-141.

Petitioner then moved for a new trial or to amend the judgment. J.A. 143-144. The district court denied both motions in an order entered on September 9, 2003. J.A. 145. Under Federal Rule of Appellate Procedure 4(a)(1)(A), the time for filing a notice of appeal expired 30 days later, on October 9. See Fed. R. App. P. 4(a)(1)(A) ("In a civil case, * * * the notice of appeal required by Rule 3 must be filed with the district clerk within 30 days after the judgment or order appealed from is entered.").

On December 12, 2003, petitioner moved to reopen the time for filing a notice of appeal on the ground that he had not received timely notice of the district court's order. J.A. 147. He relied on Rule 4(a)(6), which he quoted in its entirety:

> Reopening the Time to File an Appeal. The district court may reopen the time to file an appeal for a period of 14 days after the date when its order to reopen is entered, but only if all the following conditions are satisfied:

> (A) the motion is filed within 180 days after the judgment or order is entered or within 7 days after the moving party receives notice of the entry, whichever is earlier; and
>
> (B) the court finds that the moving party was entitled to notice of the entry of the judgment or order sought to be appealed but did not receive the notice from the district court or any party within 21 days after entry, and;
>
> (C) the court finds that no party would be prejudiced.

J.A. 148.[1]

On February 10, 2004, the district court granted the motion to reopen. J.A. 151. Under Rule 4(a)(6), the notice of appeal was unambiguously due 14 days later, on Tuesday, February 24. In its order, however, the district court erroneously stated that petitioner had until February 27 to file. *Ibid.* ("Appeal to be filed by 2/27/04."). Petitioner filed a notice of appeal on February 26. J.A. 153.

2. The court of appeals issued an order to show cause why the appeal should not be dismissed on the

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[1] In 2005, paragraphs (A) and (B) were amended "to specify more clearly what type of 'notice' of the entry of a judgment or order precludes a party from later moving to reopen the time to appeal" or "triggers the 7-day period to bring a motion to reopen," and "to set forth more logically the conditions that must be met before a district court may reopen the time to appeal." Fed. R. App. P. 4(a)(6) advisory committee's note (2005). The 2005 amendment did not alter the first clause of the rule, which gives the district court authority to reopen the filing time "for a period of 14 days." Therefore, the changes are not relevant to this case.

ground that the notice of appeal was untimely. J.A. 154-155. After receiving petitioner's response, a motions panel dismissed the appeal for lack of jurisdiction "as it applies to" the district court's judgment and denial of petitioner's motions for new trial or to amend the judgment, but held that "[t]he appeal is timely filed as it applies to the February 10, 2004 ruling." J.A. 161.

Thereafter, construing the appeal as an application for a certificate of appealability, see 28 U.S.C. 2253(c), the court denied a certificate. J.A. 162-163. Petitioner sought rehearing, and a motions panel granted a certificate of appealability. J.A. 174. The appeal was then briefed and submitted to a merits panel.

3. The court of appeals determined that the appeal was untimely, and it dismissed for lack of jurisdiction. J.A. 192.

The court stated that Rule 4(a) is "both mandatory and jurisdictional." J.A. 184. It acknowledged recent decisions of this Court "distinguish[ing] between rules that govern subject-matter jurisdiction and those that are 'inflexible claim-processing' rules." J.A. 181 n.1 (citing *Eberhart* v. *United States*, 546 U.S. 12 (2005) (per curiam), and *Kontrick* v. *Ryan*, 540 U.S. 443 (2004)). But it concluded that the Court's decisions to treat the rules in those cases as not implicating subject-matter jurisdiction were not controlling, for two reasons. First, while the timeliness issues in *Eberhart* and *Kontrick* had not been raised by the parties, here the respondent had objected that the appeal was untimely and therefore had "never forfeited his right to strict adherence to Rule 4." J.A. 182 n.1. Second, while *Eberhart* and *Kontrick* involved deadlines set only by rule, the time limit in Rule 4(a)(6) was set by Congress. See 28 U.S.C.

2107(c)(2) ("[T]he district court may * * * reopen the time for appeal for a period of 14 days.").

The court of appeals then addressed "a line of Supreme Court cases employing an equitable interpretation of appeals time limits." J.A. 185 (citing *Harris Truck Lines, Inc.* v. *Cherry Meat Packers, Inc.*, 371 U.S. 215 (1962) (per curiam)). The court held that those cases are relevant "only where a party has performed an act which, if properly done, would postpone the deadline for filing his appeal and has received specific assurance by a judicial officer that this act has been properly done." J.A. 188 (quoting *Osterneck* v. *Ernst & Whinney*, 489 U.S. 169, 179 (1989)). In the court's view, this was not such a case. First, petitioner "did not attempt to postpone a deadline for filing his appeal"; instead, he sought "a reopening of the appeal period so that he might file his untimely notice of appeal." *Ibid.* Second, it was the district court, not a party, that performed the relevant act "and purported to extend the filing date beyond what was permitted by the Rule." *Ibid.* Third, the court observed that "petitioner received no assurances from the district court that his notice of appeal was timely." *Ibid.*

Finally, the court explained that the earlier motions-panel order was not conclusive under the law-of-the-case doctrine. J.A. 190. That order was "almost entirely devoid of any language even suggesting a decision of this court that jurisdiction for this appeal should be sustained." J.A. 191. While it "[q]uizically" stated that petitioner could appeal the district court's February 10, 2004 order, there would have been no reason for him to do so, since "its outcome was favorable to him." J.A. 192. The court concluded that that portion of the motion panel's order "was surplusage * * * and, therefore, it

cannot be construed as a decision of this court." *Ibid.* For this reason, the law-of-the-case doctrine posed no barrier to dismissing the appeal.

SUMMARY OF ARGUMENT

The court of appeals correctly determined that petitioner's failure to file a notice of appeal within the time specified in Federal Rule of Appellate Procedure 4(a) deprived the court of jurisdiction. The time limits for notices of appeal in civil cases—including those for reopening the filing period under Rule 4(a)(6)—have been specified by Congress, see 28 U.S.C. 2107, and this Court has repeatedly held that statutory time limits on the initiation of appeals are jurisdictional.

A statute regulating the timing of an appeal identifies the point at which the lower court's jurisdiction ends and the appellate court's jurisdiction begins. Accordingly, courts have long treated such statutes as jurisdictional. For example, when Congress created the courts of appeals in 1891, the time limit Congress imposed for filing appeals was immediately recognized to be jurisdictional. In light of this history, when Congress enacts a statute, such as Section 2107, that imposes deadlines on appeals, the statute should be presumed to be jurisdictional.

This Court's decisions in *Kontrick* v. *Ryan*, 540 U.S. 443 (2004), and *Eberhart* v. *United States*, 546 U.S. 12 (2005) (per curiam), are not to the contrary. While those cases held that two procedural rules governing timing were not jurisdictional, the rules at issue differed in two crucial respects from Rule 4(a)(6). First, they were prescribed by this Court under the Rules Enabling Act, 28 U.S.C. 2072, rather than being set forth in an act of Congress. That is a distinction that this Court has

also recognized to be significant in its treatment of the time limits governing petitions for certiorari. While the Court has, on occasion, waived the non-statutory limit applicable to petitions in criminal cases, it has treated the statutory limit in civil cases as jurisdictional and strictly enforced it. Second, the rules in *Kontrick* and *Eberhart* governed the processing of a case by one court, not the timing of the transition from one court to a higher court. Transitional rules can be more readily characterized as jurisdictional because they define a class of cases that can be brought before a particular court.

Even if Section 2107 and Rule 4(a)(6) are not jurisdictional, they still create a mandatory procedural rule that must be enforced when properly invoked. Here, the court of appeals correctly determined that respondent had objected to the untimeliness of petitioner's notice of appeal by raising the issue in its brief. Accordingly, this is not a case in which the jurisdictional label is necessary to rescue an argument from forfeiture. Whether construed as a jurisdictional rule or a truly mandatory and inflexible rule, the result in this case should be the same.

The time limits in Rule 4(a)(6) are not subject to equitable tolling. Rule 4(a)(1) creates rigid time limits that this Court has held to be "mandatory." *Browder* v. *Director, Dep't of Corr.*, 434 U.S. 257, 264 (1978). The drafters of the rule recognized that there might be cases in which strict enforcement of those limits could be inequitable, so they provided for carefully defined exceptions, of which Rule 4(a)(6) is one. There is no basis for the creation of an additional exception.

The "unique circumstances" decisions of *Harris Truck Lines, Inc.* v. *Cherry Meat Packers, Inc.*, 371

U.S. 215, 217 (1962) (per curiam), and *Thompson* v. *INS*, 375 U.S. 384 (1964) (per curiam), do not support petitioner's claim of entitlement to tolling. To the extent that those decisions survive *Browder*, the Court has made clear that they apply only in the narrow category of cases in which "a party has performed an act which, if properly done, would postpone the deadline for filing his appeal and has received specific assurance by a judicial officer that this act has been properly done." *Osterneck* v. *Ernst & Whinney*, 489 U.S. 169, 179 (1989). This is not such a case. Petitioner sought a reopening of the time to file a notice of appeal; under Rule 4(a)(6), such a reopening is limited to 14 days. The district court purported to give petitioner 17 days in which to file, but there was no act petitioner could have performed that would properly have given him 17 days. For the same reason, even if equitable tolling were available, it would not benefit petitioner, since it was unreasonable for him to rely on an order of the district court that plainly contradicted the clear text of the rule that petitioner himself had cited and quoted in seeking relief.

ARGUMENT

THE COURT OF APPEALS CORRECTLY DISMISSED THIS CASE BECAUSE PETITIONER'S NOTICE OF APPEAL WAS UNTIMELY

A. The Filing Of A Timely Notice Of Appeal In A Civil Case Is A Jurisdictional Requirement

This Court has repeatedly held that "the taking of an appeal within the prescribed time is mandatory and jurisdictional." *United States* v. *Robinson*, 361 U.S. 220, 229 (1960); accord *Hohn* v. *United States*, 524 U.S. 236,

247 (1998); *Torres* v. *Oakland Scavenger Co.*, 487 U.S. 312, 314-315 (1988); *Budinich* v. *Beckton Dickinson & Co.*, 486 U.S. 196, 203 (1988); *Browder* v. *Director, Dep't of Corr.*, 434 U.S. 257, 264 (1978); see also Fed. R. App. P. 3 advisory committee's note (1967); *Becker* v. *Montgomery*, 532 U.S. 757, 765 (2001) (describing Federal Rules of Appellate Procedure 3 and 4 as "linked jurisdictional provisions").[2] Adhering to those holdings, the uniform practice of the courts of appeals has been to dismiss untimely appeals for lack of jurisdiction.

In civil cases, the time limits for filing a notice of appeal—and the limits on reopening the filing time under Federal Rule of Appellate Procedure 4(a)(6)—are prescribed by statute. See 28 U.S.C. 2107. This Court should reaffirm the settled understanding that those statutory limits are jurisdictional.[3]

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[2] These cases include both civil and criminal cases, and this Court's subsequent decisions in *Kontrick* and *Eberhart* cast some doubt on the accuracy of this statement in the context of non-statutory deadlines that govern criminal appeals. See note 4, *infra*. With regard to cases like this one where the relevant time limit is prescribed by statute, however, the quoted statement remains accurate.

[3] Because the issue is jurisdictional, courts of appeals routinely consider the timeliness of appeals *sua sponte*. See, *e.g.*, *Gochis* v. *Allstate Ins. Co.*, 16 F.3d 12, 14 n. 6 (1st Cir. 1994); *United States ex rel. McAllan* v. *City of New York*, 248 F.3d 48, 53 (2d Cir. 2001), cert. denied, 535 U.S. 929 (2002); *Smith* v. *Evans*, 853 F.2d 155, 157-158 (3d Cir. 1988); *Maksymchuk* v. *Frank*, 987 F.2d 1072, 1075 (4th Cir. 1993); *Wilkens* v. *Johnson*, 238 F.3d 328, 330 (5th Cir.), cert. denied, 533 U.S. 956 (2001); *Terket* v. *Lund*, 623 F.2d 29, 32 (7th Cir. 1980); *Arnold* v. *Wood*, 238 F.3d 992, 994-995 (8th Cir.), cert. denied, 534 U.S. 975 (2001); *Rodgers* v. *Watt*, 722 F.2d 456, 457 (9th Cir. 1983) (en banc); *Alva* v. *Teen Help*, 469 F.3d 946, 948 (10th Cir. 2006); *Jackson* v. *Crosby*, 437 F.3d 1290, 1292 (11th Cir.), cert. denied, 127 S. Ct. 240 (2006).

1. Historically, deadlines set by Congress for notices of appeal have been regarded as jurisdictional

Statutory time limits governing the transfer of a case from one tribunal to another—whether by appeal, by petition for review, or by certioriari—have traditionally been considered to be jurisdictional. They should continue to be so regarded unless Congress has provided otherwise.

A statute governing the timing of an appeal is jurisdictional because it identifies the point at which the subject-matter jurisdiction of the lower court ends and that of the appellate court begins. It therefore defines the class of cases that the appellate tribunal is competent to hear. Cf. *Kontrick* v. *Ryan*, 540 U.S. 443, 455 (2004). As this Court has recognized, "[t]he filing of a notice of appeal is an event of jurisdictional significance" because "it confers jurisdiction on the court of appeals and divests the district court of its control over those aspects of the case involved in the appeal." *Griggs* v. *Provident Consumer Disc. Co.*, 459 U.S. 56, 58 (1982) (per curiam).

For that reason, courts have long treated statutes imposing time limits on the initiation of appeals as jurisdictional. For example, when Congress created circuit courts of appeals and gave them jurisdiction to review certain judgments of the district and circuit courts, see Circuit Court of Appeals (Evarts) Act, ch. 517, § 6, 26 Stat. 828 (1891), it imposed a six-month time limit on such appeals, see *id.* § 11, 26 Stat. 829. That limit was immediately recognized to be jurisdictional. See, *e.g.*, *United States* v. *Baxter*, 51 F. 624 (8th Cir. 1892); *Stevens* v. *Clark*, 62 F. 321 (7th Cir. 1894); *Connecticut Fire Ins. Co.* v. *Oldendorff*, 73 F. 88 (9th Cir. 1896);

Green v. *City of Lynn*, 87 F. 839 (1st Cir. 1898). Likewise, before the creation of the circuit courts of appeals, this Court had regarded statutory limitations on the timing of appeals as limitations on its own jurisdiction. See *Scarborough* v. *Pargoud*, 108 U.S. 567, 568 (1883) ("[T]he writ of error in this case was not brought within the time limited by law, and we have consequently no jurisdiction."); *United States* v. *Curry*, 47 U.S. (6 How.) 106, 113 (1848) ("[A]s this appeal has not been prosecuted in the manner directed, within the time limited by the acts of Congress, it must be dismissed for want of jurisdiction.").

Congress is presumed to be aware of the background legal principles against which it legislates. See *Cannon* v. *University of Chicago*, 441 U.S. 677, 696-698 (1979); cf. *Astoria Fed. Sav. & Loan Ass'n* v. *Solimino*, 501 U.S. 104, 108 (1991). When it enacts a statute imposing a deadline on the initiation of an appeal, it should be presumed to intend that the deadline will be construed as jurisdictional. Of course, Congress can specify that a particular deadline is not jurisdictional. When it has not so specified, however, the deadline should be interpreted as a limitation on the court's appellate jurisdiction.

2. Recent decisions treating certain deadlines as "claim-processing rules" do not apply to Rule 4(a)

Petitioner relies (Pet. Br. 11-12) on recent decisions of this Court cautioning that there is "a critical difference between a rule governing subject-matter jurisdiction and an inflexible claim-processing rule." *Kontrick*, 540 U.S. at 456; see *Eberhart* v. *United States*, 546 U.S. 12, 13 (2005) (per curiam) (quoting *Kontrick*, 540 U.S. at 456). As the Court has observed, "[j]urisdiction * * * is

a word of many, too many, meanings." *Steel Co.* v. *Citizens for a Better Env't*, 523 U.S. 83, 90 (1998) (quoting *United States* v. *Vanness*, 85 F.3d 661, 662 n.2 (D.C. Cir. 1996)). "Clarity would be facilitated," the Court has said, if the word "jurisdictional" were used "not for claim-processing rules, but only for prescriptions delineating the classes of cases (subject-matter jurisdiction) and the persons (personal jurisdiction) falling within a court's adjudicatory authority." *Kontrick*, 540 U.S. at 455.

Petitioner's reliance on the decisions in *Kontrick* and *Eberhart* is misplaced. Those cases in no way undermine the jurisdictional nature of *statutes* governing the initiation of appeals. Such statutes impose *jurisdictional* limits worthy of the name.

Kontrick involved Federal Rule of Bankruptcy Procedure 4004(a), which provides that an objection to a debtor's discharge "shall be filed no later than 60 days after the first date set for the meeting of creditors." A creditor filed a timely objection, but he subsequently amended his filing (outside the time limit) to add a new objection. See 540 U.S. at 448-449. The debtor responded on the merits without noting the untimeliness of the new objection; only later did he raise the issue, arguing that the timing rule was "jurisdictional" and therefore a claim of untimeliness could not be forfeited. See *id.* at 450-451. This Court rejected that argument, holding that because Rule 4004 concededly did not affect the bankruptcy court's subject-matter jurisdiction, see *id.* at 454, it was merely an "inflexible claim-processing rule" that could "be forfeited if the party asserting the rule waits too long to raise the point," *id.* at 456.

Eberhart involved Federal Rule of Criminal Procedure 33, which allows district courts to grant new trials

but requires that "[a]ny motion for a new trial * * * must be filed within 7 days after the verdict or finding of guilty." Fed. R. Crim. P. 33(b)(2). Eberhart filed an untimely new-trial motion, and the government responded on the merits without addressing the issue of timing. See 546 U.S. at 13-14. This Court held that the government had forfeited its objection to the untimeliness of the motion. See *id.* at 19. In so holding, it concluded that Rule 33 is not jurisdictional: "It is implausible that the Rules considered in *Kontrick* can be nonjurisdictional claim-processing rules, while virtually identical provisions of the Rules of Criminal Procedure can deprive federal courts of subject-matter jurisdiction." *Id.* at 16.

The decisions in *Kontrick* and *Eberhart* turned on two key features of the time limits at issue. First, those limits were set out in rules adopted by this Court under the Rules Enabling Act, 28 U.S.C. 2072, rather than in a statute enacted by Congress. Second, they regulated the conduct of proceedings within a court, rather than the transfer of proceedings from one court to another.

a. Both *Kontrick* and *Eberhart* involved non-statutory rules. While *Eberhart* did not discuss this feature of the rules explicitly (but did emphasize the similarity of the rules in that case to those at issue in *Kontrick*, see 546 U.S. at 16), this fact was central to the Court's analysis in *Kontrick*. The *Kontrick* Court began its discussion of jurisdiction by emphasizing that "[o]nly Congress may determine a lower federal court's subject-matter jurisdiction." 540 U.S. at 452; see U.S. Const. Art. III, § 1. The Court noted that "[c]ertain statutory provisions governing bankruptcy courts contain built-in time constraints," and it distinguished such provisions from "the time constraints applicable to ob-

jections to discharge," which were "contained in Bankruptcy Rules prescribed by this Court." 540 U.S. at 453. Rules prescribed by the Court, it explained, "do not create or withdraw federal jurisdiction." *Ibid.* (quoting *Owen Equip. & Erection Co.* v. *Kroger*, 437 U.S. 365, 370 (1978)); see *Sibbach* v. *Wilson & Co.*, 312 U.S. 1, 10 (1941).

The distinction between time limits prescribed by statute and those prescribed only by rule is also reflected in this Court's approach to its certiorari jurisdiction. Supreme Court Rule 13 provides that a petition for a writ of certiorari must be filed within 90 days of the entry of the judgment sought to be reviewed, unless a Justice grants an extension (which may not exceed 60 days). See Sup. Ct. R. 13.1, 13.5. On its face, the rule applies to all cases, whether civil or criminal. But for civil cases, the time limits are also set out in a statute. See 28 U.S.C. 2101(c).

This Court has treated the non-statutory criminal time limit very differently from the statutory civil time limit. In criminal cases, the Court has held that the time limit may be waived: "The procedural rules adopted by this Court for the orderly transaction of its business are not jurisdictional and can be relaxed by the Court in the exercise of its discretion when the ends of justice so require." *Schacht* v. *United States*, 398 U.S. 58, 64 (1970). In civil cases, on the other hand, the Court has repeatedly held the limit to be jurisdictional, see, *e.g.*, *FEC* v. *NRA Political Victory Fund*, 513 U.S. 88, 90 (1994); *Department of Banking* v. *Pink*, 317 U.S. 264, 268 (1942), and Supreme Court Rule 13.2 cites Section 2101(c) in directing the clerk not to file any petition "that is *jurisdictionally* out of time." (emphasis added). The Court has refused to accept untimely petitions even

in cases presenting extraordinary extenuating circumstances. See, *e.g.*, *Deal* v. *Cincinnati Bd. of Educ.*, 402 U.S. 962 (1971) (petition lost by airline); *Teague* v. *Regional Comm'r of Customs*, 394 U.S. 977 (1969) (petition delayed by severe snowstorm); see also *Northwest Airlines, Inc.* v. *Spirit Airlines, Inc.*, 127 S. Ct. 340 (2006) (No. 06M7) (denying a motion to direct the clerk to file an untimely petition for a writ of certiorari).

b. A second feature of the rules at issue in *Kontrick* and *Eberhart* is that they involved the processing of claims by one court, not the transfer of a case from one court to a higher court. When prescribed by statute, the latter type of deadline may more readily be characterized as a jurisdictional rule than the rules at issue in *Kontrick* and *Eberhart*, since the deadline delineates a category of cases that can be brought before a court. As Judge Posner has observed, "[t]he emergent distinction, so far as classification of deadlines as jurisdictional or not jurisdictional is concerned, is between those deadlines that govern the transition from one court (or other tribunal) to another, which are jurisdictional, and other deadlines, which are not." *Joshi* v. *Ashcroft*, 389 F.3d 732, 734 (7th Cir. 2004).

Analogously, this Court has held that the time limit on filing a petition for review of a deportation order—a petition that transfers a case from the Board of Immigration Appeals to the court of appeals—is jurisdictional. See *Stone* v. *INS*, 514 U.S. 386, 406 (1995) (holding that "the Court of Appeals lacked jurisdiction to review" a deportation order because the petition for review was untimely). And in other cases governed by the Administrative Orders Review Act of 1950 (Hobbs Act), the courts of appeals have uniformly held that the 60-day time limit on petitions for review is jurisdictional

and may not be waived even by consent of the parties. See 28 U.S.C. 2344; *Cellular Telecomms. & Internet Ass'n* v. *FCC*, 330 F.3d 502, 508 (D.C. Cir. 2003); *Florilli Corp.* v. *Pena*, 118 F.3d 1212, 1214 (8th Cir. 1997).

3. The deadlines in Rule 4(a) are jurisdictional

Applying these principles, the time limits in Rule 4(a)—including the reopening provision of Rule 4(a)(6)—should be regarded as jurisdictional. Critically, the time limits in Rule 4(a) are prescribed by statute. And Rule 4(a) governs a step that must be taken to bring a case from the district court to the court of appeals, rather than a step in the processing of a case by one court.[4]

The basic time limit for appeals in civil cases is set by 28 U.S.C. 2107(a), which states that "no appeal shall bring any judgment, order or decree in an action, suit or proceeding of a civil nature before a court of appeals for review unless notice of appeal is filed, within thirty days after the entry of such judgment, order or decree."[5] Subsection (c)(2), in turn, provides that "the district court may * * * reopen the time for appeal for a period

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[4] Criminal appeals are different. Because no statute governs the timing of a defendant's notice of appeal in criminal cases, the United States has argued that the time limits in Federal Rule of Appellate Procedure 4(b) are not jurisdictional. See Gov't Br. at 14-21, *United States* v. *Leijano-Cruz*, 473 F.3d 571 (5th Cir. 2006) (No. 05-50280). Nevertheless, while the difference between the statutory deadline for civil appeals and the rule-based deadline for criminal appeals may be relevant in cases in which an objection is not timely raised, Rule 4(b) is a rigid, inflexible claim-processing rule that must be strictly enforced when properly invoked. See *Leijano-Cruz*, 473 F.3d at 574.

[5] Subsection (b) provides for a 60-day limit in cases where "the United States or an officer or agency thereof is a party." 28 U.S.C. 2107(b); see Fed. R. App. P. 4(a)(1)(B).

of 14 days from the date of entry of the order reopening the time for appeal," if certain conditions—*i.e.*, those identified in Rule 4(a)(6)—are satisfied.

It is true that the time limit for notices of appeal appears in a separate statutory section from the general grant of jurisdiction to courts of appeals. See 28 U.S.C. 1291, 2107. But this Court has observed—identifying Section 2107 as an example—that "some time limits are jurisdictional even though expressed in a separate statutory section from jurisdictional grants." *Barnhart* v. *Peabody Coal Co.*, 537 U.S. 149, 160 n.6 (2003). Significantly, the Court in *Kontrick* offered Section 2107 as an example of a congressional determination of "a lower federal court's subject-matter jurisdiction." 540 U.S. at 452, 453 n.8; cf. *Houston* v. *Lack*, 487 U.S. 266, 281 (1988) (Scalia, J., dissenting) ("The bar erected by §2107 in civil cases is jurisdictional.").

Because compliance with Rule 4(a) is jurisdictional, the court of appeals correctly determined that it lacked jurisdiction over petitioner's untimely appeal. The district court's error, though unfortunate, could not confer jurisdiction where it did not exist.[6]

B. Even If Federal Rule Of Appellate Procedure 4 Is Not Jurisdictional, It Is A Mandatory Rule That Must Be Enforced When Properly Asserted

Even if Rule 4(a)(6) is not jurisdictional, the judgment of the court of appeals should be affirmed on the

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[6] The one court of appeals, other than the court below, that has squarely confronted the question whether Rule 4(a) is jurisdictional in light of *Kontrick* and *Eberhart* has concluded, in accord with the decision below, that "[n]either *Eberhart* nor *Kontrick* affects the jurisdictional nature of the timely filing of [a] civil appeal." *Alva* v. *Teen Help*, 469 F.3d 946, 952-953 (10th Cir. 2006).

ground that the rule is mandatory and must be enforced when it is invoked by a party. The non-jurisdictional status of the rules in *Kontrick* and *Eberhart* was critical because the timeliness objection had been forfeited, and only a jurisdictional objection would survive. Here, by contrast, respondent properly objected to the untimeliness of petitioner's notice of appeal. Even if Rule 4(a)(6) is not strictly jurisdictional, it is clearly the type of mandatory and inflexible rule that must be strictly enforced when a timely objection is raised. Rule 4(a)(6) contains no equitable exception that would excuse an untimely filing in the circumstances presented here. Nor may petitioner circumvent the time limits of Rule 4(a)(6) by asking the district court to enter a second order reopening the time for filing a notice of appeal.

1. Respondent properly objected to the untimeliness of petitioner's notice of appeal

Kontrick and *Eberhart* make clear that even non-jurisdictional timing rules "assure relief to a party properly raising them." *Eberhart*, 546 U.S. at 19; see *Kontrick*, 540 U.S. at 456 (a "claim-processing rule" can be forfeited if not raised but may also be "unalterable on a party's application"). Here, the court of appeals correctly determined that respondent had properly raised the issue of petitioner's untimely notice of appeal by addressing it in its brief. See J.A. 181 n.1; Resp. C.A. Br. 2-3 (noting that the "district court was only permitted to reopen the appeal period for a period of fourteen (14) days," and that its order had "erroneously" allowed additional time); *id.* at 4 ("This Court lacks jurisdiction to hear an appeal from any judgment denying [petitioner's] claims on the merits.").

Petitioner suggests (Pet. Br. 11-12) that respondent should have objected sooner. But respondent had no basis to object to petitioner's motion to reopen, which did not seek more than the 14 days permitted by the rule. J.A. 148. Nor did it have occasion to object when the district court entered an order granting petitioner 17 days to file. An objection at that point would have been premature, since there was no way to know whether petitioner would actually take more than 14 days. In any event, the burden was not on respondent to be attentive to petitioner's notice-of-appeal deadline. Some litigants may choose to assist opposing parties in keeping track of filing deadlines, but there is no requirement that they do so. Petitioner cites no authority for the proposition that respondent was obliged to seek reconsideration of the district court's order. Cf. *Fuesting* v. *Zimmer, Inc.*, 448 F.3d 936, 940-941 (7th Cir. 2006) (post-judgment motion is not required to preserve an issue for appeal), cert. denied, No. 06-685 (Jan. 22, 2007).

Respondent could have filed a motion to dismiss as soon as the case reached the court of appeals. It had no duty to do so, however. See *United States* v. *Singletary*, 471 F.3d 193, 196 (D.C. Cir. 2006) ("There is no provision in the * * * Federal Rules of Appellate Procedure that requires a party to address the untimeliness of an appeal by filing a motion to dismiss."). Instead, raising the issue in its brief, its first appellate filing, was an appropriate way to preserve its rights.

2. *The time limit set out in Federal Rule of Appellate Procedure 4(a)(6) is not subject to equitable exceptions*

Petitioner argues (Pet. Br. 14-19) that the time limit for filing a notice of appeal is subject to equitable tolling, and that tolling is appropriate in the "unique circumstances" of this case. But simply because a rule is non-jurisdictional, it does not follow that it is subject to equitable tolling. Here, the structure of the rules suggests that equitable tolling is not available. And even if tolling were available, it would not be warranted by the facts of this case.

a. Petitioner is correct that a time limit may be phrased in seemingly categorical terms but still be subject to equitable tolling. Thus, this Court has recognized the settled "understanding that federal statutes of limitations are generally subject to equitable principles of tolling." *Rotella* v. *Wood*, 528 U.S. 549, 560 (2000); see *Hallstrom* v. *Tillamook County*, 493 U.S. 20, 27 (1989) ("The running of such statutes is traditionally subject to equitable tolling."). Tolling does not apply, however, when it would be inconsistent with the text or structure of the statute. See *United States* v. *Brockamp*, 519 U.S. 347, 350-352 (1997). For example, tolling is inappropriate when a statute already provides for equitable exceptions. See *United States* v. *Beggerly*, 524 U.S. 38, 48-49 (1998).

The text and structure of the Rules of Appellate Procedure suggest that it would be inappropriate to recognize an equitable exception to the time limit in Rule 4(a)(6). The drafters of the rules—and of Section 2107— were aware that there might be circumstances in which strict application of the time limits could be ineq-

uitable. That is why Rule 26(b) allows the court, for "good cause," to "extend the time prescribed by these rules." But Rule 26(b) contains an important exception: "[T]he court may not extend the time to file * * * a notice of appeal (except as authorized in Rule 4)." Rule 4, in turn, contains two specific ways in which the district court may extend the time: by 30 days on a showing of "excusable neglect or good cause" under Rule 4(a)(5)(A)(ii), or by 14 days under Rule 4(a)(6). Since these provisions are themselves exceptions to the rigid time limits of Rule 4(a)(1), designed to eliminate inequities, there is no warrant for the creation of an additional exception. Cf. *Beggerly*, 524 U.S. at 48-49.[7]

In sum, Federal Rule of Appellate Procedure 4(a) is drafted in such "emphatic" terms as to negate the "presumption" that equitable tolling is available to remedy "unfairness in individual cases" by extending the filing

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[7] Petitioner argues (Pet. Br. 22) that the district court has authority to extend the notice-of-appeal deadline beyond the limits set out in Rule 4. He relies on Federal Rule of Appellate Procedure 1(a)(2), which states that when a "motion or other document" must be filed in the district court, "the procedure must comply with the practice of the district court," and on Federal Rule of Civil Procedure 6(b), which allows the district court to extend various time limits. Petitioner's interpretation of these rules is incorrect. Appellate Rule 1(a)(2) simply means that filings in the district court must be submitted "in the form and manner prescribed by" the rules governing "the form and presentation of motions." Fed. R. App. P. 1 advisory committee's note (1979); see *Becker*, 532 U.S. at 763. Petitioner cites no authority—and we are aware of none—suggesting that Rule 1(a)(2) displaces the explicit, carefully tailored limitations of Rules 4(a) and 26(b), thereby giving the district court unlimited authority to enlarge the time for filing a notice of appeal. Nor does Rule 6(b), which applies to deadlines set by the *civil rules* or a court order, give authority to a district court to override express deadlines in the *appellate rules*, particularly rules that reflect statutory deadlines.

deadline. *Brockamp*, 519 U.S. at 350, 353. The rule is "mandatory," *Browder*, 434 U.S. at 264, "rigid," *Eberhart*, 546 U.S. at 13, and "inflexible," *Kontrick*, 540 U.S. at 456. That character is only reinforced by the role of the rule in the boundaries—whether or not strictly jurisdictional—between the trial and appellate courts. See p. 16, *supra*. To be sure, the application of Rule 4(a) may sometimes produce harsh results, but that is true of any deadline. See *United States* v. *Locke*, 471 U.S. 84, 101 (1985).

b. Petitioner errs in relying (Pet. Br. 16) on the "unique circumstances" decisions of *Harris Truck Lines, Inc.* v. *Cherry Meat Packers, Inc.*, 371 U.S. 215 (1962) (per curiam), and *Thompson* v. *INS*, 375 U.S. 384 (1964) (per curiam). In *Harris*, the district court granted an extension of the notice-of-appeal deadline for "excusable neglect," under what was then Federal Rule of Civil Procedure 73(a). See 371 U.S. at 216; see also Fed. R. App. P. 4(a)(5)(A)(ii). The court of appeals determined that the standard for excusable neglect had not been met, and it dismissed the appeal. See 371 U.S. at 216. This Court reversed, noting "the obvious great hardship to a party who relies upon the trial judge's finding of 'excusable neglect.'" *Id.* at 217. In *Thompson*, the appellant filed an untimely new-trial motion that the district court erroneously declared to be timely; he then filed a notice of appeal within 60 days of the denial of his motion but not within 60 days of the original judgment. See 375 U.S. at 385-386. Relying on *Harris*, this Court held that the appeal could proceed because the appellant "did an act which, if properly done, postponed the deadline for the filing of his appeal," and "the District Court concluded that the act had been properly done." *Id.* at 387.

This Court has not actually applied either *Harris* or *Thompson* since its one-sentence order in *Wolfsohn* v. *Hankin*, 376 U.S. 203 (1964) (per curiam). Significantly, the Court declined to apply *Thompson* in *Browder*, despite facts that were virtually identical: the appellant filed an untimely new-trial motion; the district court considered the motion on the merits, and the appellant delayed filing his notice of appeal while the motion was pending. See 434 U.S. at 260-263. This Court held that the court of appeals lacked jurisdiction over the untimely appeal. See *id.* at 264-265. As several courts of appeals have recognized, *Browder* "casts considerable doubt on the continued viability of the unique circumstances doctrine." *Panhorst* v. *United States*, 241 F.3d 367, 371 (4th Cir. 2001); see *Parke-Chapley Constr. Co.* v. *Cherrington*, 865 F.2d 907, 913 n.6 (7th Cir. 1989); *Smith* v. *Evans*, 853 F.2d 155, 160-161 (3d Cir. 1988); see also *Lack*, 487 U.S. at 282 (Scalia, J., dissenting) ("Our later cases * * * effectively repudiate the *Harris Truck Lines* approach.").

The Court need not determine whether the "unique circumstances" cases have any continuing vitality, because those cases are inapplicable here. But cf. *Lapides* v. *Board of Regents of Univ. Sys.*, 535 U.S. 613, 622-623 (2002) (overruling *Ford Motor Co.* v. *Department of Treasury*, 323 U.S. 459 (1945), as inconsistent with other Supreme Court decisions despite acknowledging that *Ford* could be distinguished). The result in *Harris* can be explained—and *Harris* can be distinguished from this case—on grounds of practicality and sound judicial administration. The rules give the district court discretion to determine whether there has been a showing of "excusable neglect" that would justify an extension. But an extension issued before the notice-of-appeal deadline

has passed would be of little value if parties had to worry that "an appellate court [might] second-guess the wisdom of the exercise of discretion under Rule 4." *Bailey* v. *Sharp*, 782 F.2d 1366, 1369 (7th Cir. 1986) (Easterbrook, J., concurring). For this reason, it might make some sense to say, in effect, that the district court's determination should be conclusive. That rationale does not apply here, where the district court lacked discretion over the length of the period during which it could reopen the time for filing an appeal. That period was fixed by statute at 14 days.

Thompson is similarly unhelpful to petitioner. While a broad reading of *Thompson* might suggest the general proposition that parties should not suffer for relying on the district court's statements about deadlines, the Court has made clear that *Thompson* is not to be read broadly. Instead, it "applies only where a party has performed an act which, if properly done, would postpone the deadline for filing his appeal and has received specific assurance by a judicial officer that this act has been properly done." *Osterneck* v. *Ernst & Whinney*, 489 U.S. 169, 179 (1989). This is not such a case. Petitioner performed an act—filing a motion under Rule 4(a)(6)—which, if properly done, could have given him no more than 14 days in which to file a notice of appeal. There was no act petitioner could have performed that would have given him 17 days. *Thompson* is therefore inapplicable here. Moreover, *Thompson* involved a situation in which the district court's ruling primarily affected proceedings in that court, with only an incidental effect on the deadline for filing an appeal. Here, by contrast, the district court's erroneous ruling addressed a motion to extend the time for filing an appeal, and so directly implicated the interest in ensuring strict com-

pliance with the rules for transferring cases from one court to another.

c. Finally, even if there were an equitable exception to the 14-day limit of Rule 4(a)(6), it should, at a minimum, require that a party have reasonably relied on the statements of the district court. Cf. *Lawrence* v. *Florida*, No. 05-8820 (Feb. 20, 2007), slip op. 8 (assuming the availability of equitable tolling under 28 U.S.C. 2254(d), and stating that it would require the defendant to show "(1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way and prevented timely filing") (citation and internal quotation marks omitted). Here, petitioner's reliance was unreasonable.

Petitioner had just filed a motion seeking an extension under Rule 4(a)(6), and the motion quoted the entire text of the rule. J.A. 148. Petitioner was therefore well aware that the rule allows the district court to "reopen the time to file an appeal for a period of 14 days," not to reopen the time for a period of 17 days. Fed. R. App. P. 4(a)(6). It would have been easy for petitioner to calculate that a 14-day period from the entry of the district court's February 10 order would expire on February 24, not February 27. Petitioner had no basis for relying on the February 27 date, which was plainly erroneous. Certainly, nothing that the district court did "prevented timely filing." *Lawrence*, slip op. 8.

The unreasonableness of petitioner's conduct is compounded by the fact that the notice of appeal is a one-sentence document that is easy to prepare. See Fed. R. App. P. 3(c). Indeed, the rules provide a simple form for appellants to follow. See Fed. R. App. P. Form 1. By the time he filed his Rule 4(a)(6) motion, petitioner apparently had already determined that he wished to ap-

peal. See J.A. 148 (explaining that petitioner sought reopening so "that [he] may timely file a notice of appeal"). Petitioner makes no effort to explain why the 14-day period provided by the rule was insufficient for him to prepare and file a notice of appeal.

3. The district court may not enter a second order reopening the time to file a notice of appeal

Petitioner suggests (Pet. Br. 21) that the case should be remanded to the district court with instructions to enter an order reopening his time for filing an appeal for 14 days, calculated from the date of that new order. This is so, he alleges, because that court of appeals motions panel stated that petitioner's appeal was "timely filed as it applies to the [district court's] February 10, 2004 ruling." J.A. 161. But as the court of appeals merits panel correctly observed, J.A. 192, that ruling was not adverse to petitioner, since it granted his motion to reopen his appeal time. As a result, petitioner could not appeal the February 10 ruling, see *Mathias* v. *WorldCom Techs., Inc.*, 535 U.S. 682, 684 (2002) (per curiam), and consistent with the reality that the February 10 order was favorable to petitioner, his notice of appeal did not identify that ruling as an order to be appealed, see J.A. 153. The February 10 ruling therefore provides no basis upon which this Court could remand the case to the district court for the issuance of a new order reopening petitioner's time for appeal.

The district court no longer has authority to reopen petitioner's time for filing a notice of appeal. Rule 4(a)(6) requires that the motion to reopen be filed within 180 days of the entry of judgment. That time has long since passed. Amicus National Association of Criminal Defense Lawyers suggests (Amicus Br. 25) that the rule

permits the district court to enter a second reopening order based on petitioner's original motion. This reading of the rule would allow petitioner to circumvent Congress's decision that a court may reopen a party's appeal time under Rule 4(a)(6) for only 14 days. See 28 U.S.C. 2107. Indeed, under this argument, a court could extend the time for filing a notice of appeal under Rule 4(a)(6) indefinitely, merely by issuing new orders granting successive 14-day extensions based on a party's original motion. That would negate a core feature of the limited relief Congress authorized. It also would defeat the purpose of requiring that a motion to reopen be filed within 180 days after entry of the judgment or order being appealed. See Fed. R. App. P. 4(a)(6)(B). That limitation is intended to provide an "outer time limit" to ensure that the relief provided under Rule 4(a)(6) does not suspend the finality of a judgment or order indefinitely. See Fed. R. App. P. 4 advisory committee's note (1991).[8]

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[8] Amicus also relies (Amicus Br. 26) on decisions holding that a district court may recertify an order for interlocutory appeal under 28 U.S.C. 1292(b) if a party fails to ask the court of appeals to permit such an appeal within 10 days of the district court's first certification order. Those decisions are inapposite. Section 1292(b) allows interlocutory appeal of district court orders at any time during the course of the litigation, so long as the district court makes the requisite findings. There is no requirement that the certification order be sought or entered within a specific period of time after the order sought to be appealed. See 28 U.S.C. 1292(b); Fed. R. App. P. 5(a)(3). In contrast, 28 U.S.C. 2107(c) and Federal Rule of Appellate Procedure 4(a)(6) pertain to appeals from final judgments, and their strict time limits promote important finality interests that are not present in the context of Section 1292(b).

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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